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No. 98-1695

In the Supreme Court of the United States

OCTOBER TERM, 1998

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL., *Petitioners,*

v.

PRINCE GEORGE CENTER INC., ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION

Pursuant to Rule 15.8, petitioner Prudential Insurance Company of America submits this Supplemental Memorandum to address the Court's decision in *Ortiz* v. *Fibreboard Corp.*, ___ U.S. ___ (No. 97-1704) (June 23, 1999), which was announced the day after Prudential filed its Reply Brief in support of its Petition for a Writ of Certiorari. The decision in *Fibreboard* reenforces several of the grounds for granting plenary review in this case.

1. Adequacy of Representation by Counsel. In Fibreboard, the Court noted that in its earlier decision in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), it had observed that the crucial subject of the "adequacy of representation" in a class action includes not only the "adequacy of named plaintiffs" but also the "[1] competency and [2] conflicts of class counsel." Slip op. at 39 n.31. The Court explained that, in *Amchem*, it had "concentrated" on the adequacy of the named plaintiffs to represent the interest of other class members. *Ibid.* But *Fibreboard* ultimately turned on the adequacy of class counsel, and specifically on the existence of disabling "conflicts" of interest in counsel's obligations to various competing groups of class "clients."

The present case involves the other requirement for adequacy of class counsel noted in *Amchem* and reiterated but not addressed in *Fibreboard* — the "competence" of class counsel in performing the functions they have voluntarily assumed. Prudential has urged the Court to address a vital and pervasive element of "competence" in representing the interests of absent members of virtually any class:

> To what extent does the Due Process Clause require class counsel to conduct at least some systematic investigation into the value of the claims of absent class members,

especially where those claims are already pending in another forum?

Thus, this case frames an important and endemic issue noted but not further explored in both *Amchem* and now *Fibreboard*.

In opposing Prudential's petition, respondents have argued that the Court should defer to the trial court's finding that class counsel were constitutionally adequate because the law firms representing the individual class representatives had "other significant experience in asbestos litigation" (Opp. 3 n.3) and included some of the "leading" asbestos-litigation lawyers "in the nation" (Opp. 24). This argument is remarkably similar to the finding that the district court was persuaded to make in approving the class-wide settlement in *Fibreboard*, where the district court expressly rested its finding that class counsel provided adequate representation on the determination that "Class Counsel are highly competent, skilled and experienced members of the plaintiffs' asbestos bar . . . ." *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505, 524 (E.D. Tex. 1995). The similarity in the arguments is not surprising, because some of the counsel involved in *Fibreboard* also served as counsel for the class here.

This Court in *Fibreboard*, however, found this reliance on general "experience" and "skill" no substitute for a searching inquiry into the way class counsel actually performed their functions in purporting to represent the interests of absent class members. In reversing the finding of adequacy of class counsel, this Court expressly ruled that it is not reasonable in a class action to assume that the "settlement amount" the class counsel is willing to take results from adequate representation. The Court explained that in the ordinary, single-client case, the courts may "assume that parties of equal knowledge" agreed upon the figure "through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in

the negotiation." Slip op. at 34. "But," the Court cautioned, "no such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees." *Ibid.* The Court then added:

> In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.

Id. at n.30.

Here, of course, there was no bargaining with "equal knowledge." On one side of the table were counsel for the company respondents, who were simultaneously defending against Prudential's claims against those same respondents in federal court in New Jersey. They knew that the federal court was the setting for trial of Prudential's claims for over $110 million in damages. (We do not know what they knew about the value of *other* pending claims against those companies.) On the other side of the table, "ostensibly" representing Prudential's interests as an absent class member, were class counsel who not only knew nothing about the existence of Prudential's suit but conceded below that *they had done nothing* to investigate or evaluate the claims of class members like Prudential.[1] In light of its realistic observation in *Fibreboard*, the Court can surmise a possible connection between the willingness to compromise 36,000 claims of unexamined value for an average of $125 while securing support for a $3 million fee for class counsel.

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[1] Indeed, at least in *Fibreboard*, class counsel was sufficiently alert to the interests of class members in the same posture as Prudential here, because that settlement class "did not include claimants with actions presently pending" against the settling defendant. Slip op. at 6-7.

Thus, the cautionary principles so recently articulated in *Fibreboard* show why the Court should grant review here in order to take the next, important step in defining the components of constitutionally adequate representation by class counsel: Can representation be adequate without conducting a meaningful inquiry into the existence and value of pending claims?

2. Adequacy of Notice. In *Fibreboard*, the Court reiterated its holding in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985), on which Prudential relies, that "before an absent class member's right of action was extinguishable due process required that the member 'receive notice plus an opportunity to be heard and participate in the litigation' . . . ." Slip op. at 30. The present case frames important practical questions about defining generic contours to this element of due process. Specifically, to be adequate, must the notice to a large, out-of-state corporation presumptively be directed to its corporate headquarters, and in any event must notice be directed to the address the absent class member already has provided earlier in the litigation?

In answering those questions, another aspect of *Fibreboard* is apt. In analyzing the constraints on settling the financial claims of absent class members, the Court explained that it was guided by concern for the "Seventh Amendment jury trial rights of absent class members" and the risk that denying absent class members an effective opportunity to opt out of a settlement "compromises their Seventh Amendment rights without their consent." Slip op. at 27-28.

That is exactly what happened here as a result of the notice process sustained by the lower courts. Prudential's federal claims against the company respondents were on the eve of a jury trial in the District of New Jersey, a jury trial to which they had a Seventh Amendment right. The palpable defects in the notice process effectively deprived Prudential of any realistic, timely chance to opt out of the Pennsylvania state

court settlement and thus to preserve their Seventh Amendment rights. The Court, therefore, should grant review to establish that readily available notice procedures best calculated to protect Seventh Amendment rights must be used, as they were not in this case.

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